No. 8.

The Lords found the property of the goods belonged to the pursuer, and decerned the defender to make restitution, but assoilzied him *a spolio*.

Fol. Dic. v. 2. *p.* 413. *Harcarse, No.* 864. *p.* 245.

1707. *March* 15.

BAILIE JOHN HAY, Merchant in Edinburgh, *against* CHARLES HAY, DAVID MITCHEL, and JOHN YORSTOUN, Bakers in Edinburgh.

No. 9.

A person who sold some victual of the growth of lands, whereof he had taken upon him the management in absence of the heritor, taking the price payable to himself, having died before the term of payment, the Lords found that the victual was not the defunct's, and that therefore the price was not *in bonis ejus*, nor could be claimed by his executor-creditor.

Charles Hay, David Mitchel, and John Yorstoun, bakers in Edinburgh, having 21st December, 1704, entered into a contract with the deceased Mr. Christopher Seton, who had, after his father's death, in his brother the present Earl of Wintoun's absence, taken upon him the management of the estate of Wintoun; " By the which contract he stood obliged to deliver to them at their granaries, in the Water of Leith, 400 bolls of wheat of the growth of the Earldom of Wintoun, crop 1704, with the ordinary measure that the Earl's tenants were in use to deliver him his farm; and they on the other hand became bound to pay to him or his order, eight pounds for each delivered boll;—Bailie John Hay, as executor creditor to the said Mr. Christopher, who died before payment of the price, confirmed in his testament 2000 merks, as due to him upon the said contract by the Bakers, registered the contract and charged them with horning. They suspended upon this ground, That the price of the said victual was not *in bonis* of the said Mr. Christopher the time of his decease, nor confirmable by his creditor; but appears from the tenor of the contract to have been the Earl's own victual, whereof the price could only belong to him or his creditor; Mr Christopher being but a *negotiorum gestor*, a trustee and manager, and in the case of a factor who had the simple *jus exigendi*, that upon his death fell to the heritor for whose behoof he acted. Yea, the Earl upon his return could have divested him of his trust, and recovered the price of the victual from the suspenders: For betwixt Pearson and Murray, No. 80. p. 2625. it was found, That rents uplifted by a chamberlain were the Master's property, which the Chamberlain could not retain or compense by debts of the constituent he was assigned to; and *multo minus* can the creditor of a factor affect the constituent's rents for the factor's own debt. And *ita est*, that the creditors of the Earl of Wintoun had arrested in the suspender's hand, and are called in a multiple-poinding.

Answered for the charger. The suspenders being expressly obliged by the contract to pay the price of the victual to Mr. Christopher or his order, the money was as much *in bonis defuncti*, as they granted bond for it to his heirs and assignees. And as no objection could have been made against payment to Mr. Christopher's assignee, far less can payment be refused to the charger, who by his confirmation is come in place of Mr. Christopher. Nor doth it alter the case, That the wheat contracted for was of the growth of Wintoun; because Mr. Christopher might have been master of the product of that estate by singular titles; and the suspenders have bargained with him, not *factorio nomine*, but as a proprie-

tor. The decision Pearson against Murray doth not meet the case, for whatever retention, &c. a Chamberlain may have against his constituent, that cannot hinder the debtor of a defunct to make payment to his executor creditor: And whatever my Lord Wintoun might plead, it is *jus tertii* to the suspenders to obstruct the charger's payment.

No. 9.

The Lords found, That the victual was not Mr. Christopher's, and that therefore the price was not *in bonis defuncti*, nor could be claimed by Bailie Hay as his executor creditor.

Fol. Dic. v. 2. p. 412. Forbes, p. 150.

1731. *December.* LORD STRATHNAVER *against* M'BEATH.

No. 10.

John Mathison, drover, bound for England with a drove of cattle belonging to himself, took the trust of another drove belonging to James M'Beath, which he undertook to sell upon his own account. Mathison dying in England, while a part of this drove remained on hand unsold, Robert Gordon, his fellow drover, disposed of the cattle, took up what money belonged to the defunct, and, after paying his funeral charges, &c. returned to Scotland with £.130, ready to be delivered to those having best right. In a competition betwixt an executor-creditor of the defunct's and the said James M'Beath, the Lords found the money lying by Mathison at his death, and intromitted with by Robert Gordon, and also the price of the cattle sold and received by Robert Gordon after Mathison's death, was presumed to be the price of M'Beath's cattle so far as extended to the value of the same, and not *in bonis* of Mathison; and therefore preferred M'Beath to the executors-creditors of Mathison. See APPENDIX.

Fol. Dic. v. 2. p. 412.

1725. *December* 16.
SIR WILLIAM COCKBURN *against* CREDITORS of THOMAS CALDERWOOD.

No. 11.
Price of lands, Whether a *surrogatum* for the lands?

Alexander Martin being creditor upon the estate of Ryslaw by infeftment for upwards of £.30,000 Scots, the right after his death was adjudged by Doctor Hay and Thomas Calderwood, two of his creditors, in the year 1695. Thomas Calderwood, upon the title of Martin's infeftment, carried on a sale of the estate of Ryslaw, and got himself in effect ranked sole creditor, and at the same time became a purchaser; in which process Doctor Hay was at first called, but he died during the dependence, and there was no transference against his heirs, nor appearance made for them. Thomas Calderwood, immediately after the purchase, without being infeft, sold the lands to Mortonhall, and made over his decreet of sale. Mortonhall paid some part of the price, retaining the remainder in his